

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLOWE J. HEARD,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 239725

Wayne Circuit Court

LC No. 01-003340

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD M. WASHINGTON,

Defendant-Appellant.

No. 239727

Wayne Circuit Court

LC No. 01-003340

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, defendant, Marlowe J. Heard (defendant Heard), appeals as of right his jury trial conviction for assault with the intent to rob while armed, MCL 750.89, and defendant, Donald M. Washington (defendant Washington), appeals as of right his jury trial convictions for assault with the intent to rob while armed, MCL 750.89, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Both defendants assert that the verdict was against the great weight of the evidence, and that they were denied due process since the jury trial took place on September 11th and 12th, 2001 and as a result the jury was subjected to stress. Defendant Heard also challenges the sufficiency of the evidence supporting his conviction, and accuses the trial court of denigrating defense counsel and violating his right to prepare his defense. Defendant Washington, in a standard 11 brief, alleges that he was denied the effective assistance of counsel at trial. All of the challenges fail and we affirm.

Defendants first argue that they were denied due process because their respective verdicts were against the great weight of the evidence. We disagree. Defendant Heard failed to raise the

issue before the trial court, and thus failed to preserve this issue. This Court reviews unpreserved claims on appeal for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762, 765; 597 NW2d 130 (1999).

Defendants specifically argue that Hopkins' testimony lacked credibility because it was inconsistent with other testimony. The test to determine if the verdict stands against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Hopkins' testimony was, to some extent, inconsistent with other witnesses. However, those inconsistencies were minor and the substance of Hopkins' testimony was consistent with the testimony of defendants' only witness, Thomas. Hopkins and Thomas both testified that defendants and Hopkins were on Linwood near Pilgrim at the same time. Further, they testified that defendants were in a black two-door Ford Probe. Also, that defendants at some point exited the vehicle. Further, that defendants and Hopkins engaged in conversation, and then Hopkins quickly fled on Pilgrim. Here, the jury reasonably believed that Hopkins quickly fled for a reason, and accepted Hopkins' testimony that defendant Washington had a gun, and stated, "give me your money," while Heard was approaching Hopkins. Notably, Thomas testified that he could not hear the conversation. Since Hopkins' testimony was consistent with defense witness Thomas' testimony, defendants claim that Hopkins' testimony was not believable is without merit. Therefore, there is no miscarriage of justice and defendants convictions must stand.

Defendant Heard's claim implicates an argument based on the sufficiency of the evidence. We can address this issue because criminal defendants need not take any special steps to preserve a challenge to the sufficiency of the evidence. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

Regarding defendant Heard's challenge to the sufficiency of evidence, to sustain a conviction for assault with intent to rob while armed, the prosecution must show: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra*, 460 Mich 757.

Defendant Heard's specific contention is that Hopkins' testimony is unworthy of belief. However, questions regarding the credibility of witnesses are left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Affording the prosecution all reasonable inferences, Hopkins' testimony, that after defendants exited the vehicle, defendant Washington pointed a black steel revolver at Hopkin's

head and stated, “give me your money,” while defendant Heard approached Hopkins reaching toward his waist area, is accepted as true. Moreover, Hopkins’ testimony, that he heard two gunshots, is also accepted as true. Therefore, from this evidence, a rational jury could find beyond a reasonable doubt that defendant Heard aided and abetted defendant Washington in an assault with intent to rob Hopkins while armed. See MCL 767.39.

Defendants next argue that they were denied a fair trial because the terrorist attacks of September 11, 2001, and two bomb threats occurred during their trial, which thereby prevented the jury from properly concentrating on testimony and from thoughtfully deliberating on its verdict. We disagree. Defendant Washington preserved this issue by moving for a new trial on the basis of this issue and because the trial court addressed the issue. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). However, defendant Heard did not raise this issue at trial or in a motion for new trial, and therefore, did not preserve the issue. We review a trial court’s decision to grant or deny a motion for a new trial for an abuse of discretion. *Id.* However, in order to avoid forfeiture of an unpreserved issue on appeal, defendant Heard must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant’s substantial rights. *Carines, supra*, 460 Mich 760-761, 765.

Here, defendants failed to establish that they were denied a fair trial. First, defendants have failed to demonstrate prejudice resulting specifically to them. Moreover, jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court instructed the jury on the very points that defendants contend denied them a fair trial. Specifically, the trial court instructed the jury to “remember that you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law.” More importantly, the jurors undertook the following oath:

you do solemnly swear that in this action now before the court you’ll justly decide the questions submitted to you, that unless you are discharged by the court from further deliberation, you will render a true verdict and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court.

Since the jury took an oath to concentrate on testimony and to thoughtfully deliberate on its verdict, the trial court did not err in denying defendant Washington’s motion for a new trial. To that end, defendant Heard’s claim also fails to establish error, and he, accordingly, forfeits the issue.

Defendant Heard argues that the trial court’s conduct denigrated defense counsel and improperly infringed on the province of the jury. We disagree. Because defendant Heard failed to preserve this issue by objecting to the alleged denigrating comments, the issue is forfeited unless (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected defendant’s substantial rights. *Carines, supra*, 460 Mich 761-762, 765.

“A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents. Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing.” *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107

(1989), citing *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988). However, a trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Cole*, 349 Mich 175, 199-200; 84 NW2d 711 (1957). The record must be reviewed as a whole and portions of the record should not be taken out of context. *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988).

The alleged denigrating comments arose during defense counsel's attempt to impeach, over the prosecution's objection, Hopkins' testimony with a bus schedule. The trial court questioned the foundation of the bus schedule and inquired about whether the bus was running on schedule. The trial court then permitted defense counsel to question Hopkins with the bus schedule. Reviewed as a whole, the record reflects that the trial court treated defense counsel with consideration. Defendant Heard's claim is without merit, and this issue is forfeited.

Defendant Heard also argues that the above conversation between the trial court and defense counsel infringed on the province of the jury. We disagree. Defendant Heard cites a sixth circuit case, *United States v Nunez*, 889 F2d 1564, 1569 (CA 6, 1989), that addresses a trial court's comments to a deliberating jury. Here, however, the jury was not deliberating when the comments were made and the jury did not request clarification of the evidence. Therefore, defendant Heard's claim is without support, and therefore, forfeited.

Defendant Heard last argues that the trial court improperly denied his motion for continuance to allow him to prepare his witness. We disagree. Thomas was not on defendant Heard's witness list, but the trial court, in its discretion, permitted him to testify over the prosecution's objection. Second, the trial had been postponed twice in two days for reasons beyond the control of the trial court and parties. Moreover, defendant Heard was not prejudiced by this ruling. Thomas' testimony was brief, he answered each question asked by defendant Heard's counsel, and only one question was asked of him on cross-examination. Therefore, because it is unlikely that Thomas' testimony would have been different had defendant Heard's counsel had additional time to prepare Thomas to testify, no prejudice is shown. See *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified in part 457 Mich 885 (1998). Therefore, the trial court did not abuse its discretion in denying defendant Heard's request for a continuance.

Defendant Washington, in a late filed Standard 11 brief raises several issues. Defendant Washington argues that he was denied the effective assistance of counsel. This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The right to counsel that the United States and Michigan Constitutions guarantee, U.S. Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 657 (1984); *People v Pubart* 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance is presumed, and a defendant bears a heavy burden to prove to the contrary. *LeBlanc, supra*, 465 Mich 578.

Defendant Washington claims that he was denied the effective assistance of counsel when his defense attorney made certain comments during his closing argument. Specifically, defendant Washington states that defense counsel actually admitted his clients guilt when he summarized the testimony of the single defense witness and stated the following:

Mr. Thomas was called as a defense witness and what did he say? Yeah, these two guys robbed him, they were in a black car, there was some conversation, they got out and this guy ran away. Did he see a gun ? No.

Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Here, counsel's statement does not amount to a concession of guilt. Instead, defense counsel argued that no gun was present at the scene of the crime which constituted trial strategy since defendant was charged with assault with the intent to rob while armed, MCL 750.89, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b. We will not substitute our judgment for counsel's regarding matters of trial strategy and find no error. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant Washington also claims that he was denied the effective assistance of counsel because his counsel failed to object when the trial court allegedly bolstered the credibility of the police during jury selection. This Court reviews the trial court's conduct of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). A trial court "abuses its discretion if it does not adequately question jurors regarding the potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.*

Here, a review of the record reveals that the trial court was merely performing its duty when it engaged in an exchange with a potential juror about her misgivings concerning the Detroit Police Department and her related ability to believe a police officer's testimony. And, contrary to defendant Washington's urging we do not find the court's statements to be unfair, partial, biased, or prejudiced. As such, we find that the trial court did not abuse its discretion in the conduct of voir dire. *Tyburski, supra*, 445 Mich 619. Since there was no error, and counsel is not required to advocate a meritless position, defense counsel did not err when he did not object to the court's statements. *People v Sinder*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant Washington finally argues that he was denied the effective assistance of counsel because counsel did not object when Hopkins testified that he knew defendants and that they had been "in and out of jail and they used to hang out in front of the party store." Defendant Washington correctly points out that MRE 404(b)(1) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, Hopkins' comment was not directed specifically toward defendant Washington and provided no details of another crime, wrong, or act committed by defendant Washington. Defense counsel may have chosen not to object in order to avoid bringing attention to the statement as a matter of trial strategy. We will not substitute our judgment of that of trial counsel and will not assess counsel's competence with the benefit of hindsight. *Rice (On Remand), supra*, 235 Mich App 445.

In any event, taken individually or grouped together, defendant's assignment of errors has not established ineffective assistance of counsel. Defendant has not shown that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *Rodgers, supra*, 248 Mich App 714.

Affirmed.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio